Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promoting the Availability of Diverse and Independent Sources of Video Programming	))	MB Docket No. 16-41

COMMENTS OF
<u>NCTA – THE INTERNET & TELEVISION ASSOCIATION</u>

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NCTA – The Internet & Television Association hereby submits its comments on the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

INTRODUCTION

The NPRM follows closely on the heels of a Notice of Inquiry ("NOI") issued by the Commission earlier this year. That Notice purported "to start a fact-finding exercise on the current state of programming diversity" and "to assess how the Commission or others could foster greater consumer choice and enhance diversity in the evolving video marketplace by eliminating or reducing any barriers faced by independent programmers in reaching viewers."[1]

Specifically, the NOI asked about issues that independent programmers (which it defined as programmers that are not vertically integrated with a multichannel video programming distributor ("MVPD")) face in seeking access to viewers. It sought comment on particular practices and contractual arrangements between MVPDs and program networks that might constrain the ability of independent programmers to distribute their programming online or on MVPD systems. And it asked what authority the Commission might have, if any, to regulate such practices.

[1] NOI, ¶ 2.

In its comments on the NOI, NCTA showed that today's video programming marketplace is intensely competitive, offering consumers an enormous array of diverse programming – on MVPD systems and online – from a large number of content owners, the vast majority of which are unaffiliated with any MVPD.[2] We argued that in such a competitive marketplace, regulatory intervention for the purpose of promoting particular programming based on ownership or content is not only unnecessary but is also likely to distort rather than promote the competition so often cited by then-Chairman Wheeler as the Commission's primary goal.[3] Moreover, regulation that had such a purpose and effect would raise serious First Amendment problems. Finally, we showed that, in any event, none of the statutory provisions identified in the NOI as potential sources of authority for such regulatory intervention in fact confer such jurisdiction.[4]

Nevertheless, the NPRM proposes to intervene directly in the competitive video programming marketplace with rules that flatly ban certain contractual arrangements – specifically, "unconditional" most favored nation ("MFN") provisions[5] and "unreasonable" alternative distribution mechanisms ("ADMs") that restrict independent programmers from distributing their programming to alternative distributors.[6] The proposed rule does not define "independent programmer," but the NPRM seeks comment on whether the definition should be narrower than it initially proposed, so that it encompasses only those programmers that are

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2 NCTA NOI Comments at 2-4.

3 *Id.* at 4-7.

4 *Id.* at 7-9.

5 NPRM, ¶¶ 18-22.

6 *Id.*, ¶¶ 23-31.

unaffiliated with either an MVPD or other large programming entity such as a broadcast network or a movie studio.[7]

The Commission tentatively finds authority for such regulation of contractual arrangements in the first sentence of Section 616(a) of Title VI of the Communications Act of 1934, as amended, which directs the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors," before identifying the specific provisions to be included in those regulations.[8] As NCTA and others pointed out in their comments on the NOI, that sentence cannot reasonably (or constitutionally) be viewed as an open-ended authorization to regulate carriage agreements and related practices in any way that the Commission sees fit.

The Commission received comments on the NOI from a handful of parties that are having difficulties gaining access to as many distribution platforms as they would like in today's competitive and evolving marketplace. But these comments cannot refute or undermine the fact that there is a vast amount of diverse programming – including independent programming – available to consumers via MVPD services and online distributors; that, in these circumstances, regulation of the contractual relationships between programmers and operators may serve to promote particular *competitors* but will only distort marketplace *competition*; and that nothing in the Communications Act authorizes any such regulation. In these comments, we briefly reiterate these points and their rationale.

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[7] *Id.*, ¶¶ 16-17.

[8] *Id.*, ¶¶ 34-39. *See* 47 U.S.C. § 536(a).

I. THE COMMISSION LACKS AUTHORITY TO IMPOSE THE PROPOSED RESTRICTIONS ON THE TERMS AND CONDITIONS OF PROGRAMMING CONTRACTS.

We begin with the matter of the Commission's statutory authority – because such authority is a prerequisite for considering the adoption of rules. The Commission's reliance on the first sentence of Section 616(a) for the open-ended authority that it asserts is wholly misplaced.

That first sentence provides that "[w]ithin one year after the date of enactment of this section, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors."[9] But the second sentence of Section 616(a) goes on to list six specific provisions that the regulations adopted by the Commission are to *include*. Specifically, "[s]uch regulations shall –

> (1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;
>
> (2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;
>
> (3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;

[9] 47 U.S.C. § 536(a).

> (4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;
>
> (5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and
>
> (6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.[10]

The Commission contends that while this list of provisions must be included in the Commission's regulations, the list is "not exhaustive," so that the Commission may adopt any other regulations of programming agreements that it sees fit.[11] But the legislative history makes clear that Section 616 was aimed *only* at the specific practices identified in the enumerated regulations – namely, insistence by cable operators and other MVPDs that programmers grant them a financial interest in their programming or exclusive distribution rights in return for carriage, and unfair discrimination against programmers regarding the terms of carriage based on whether programmers are or are not affiliated with the cable operator or other MVPD.[12] The House and Senate Reports mention only those specific prohibitions, and say nothing about any separate grant of broad, roving authority over the relationship between MVPDs and programmers.[13] Read properly, Section 616 directed the Commission to adopt regulations governing programming agreements, and it enumerated with specificity the *only* particular provisions which those regulations were to include.

As AT&T stated in its comments on the NOI, "The Commission recognized as much in its 1993 Second Report and Order, concluding that 'the implementing rules for program carriage

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[10] *Id.*

[11] NPRM, ¶ 36.

[12] *See Report of the Committee on Energy and Commerce of the House of Representatives*, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 4, 110 (1992); *Report of the Senate Committee on Commerce, Science and Transportation*, S. Rep. No. 102-92, 102d Cong. 2d Sess. 64, 79.

[13] *See id.*

agreements that we adopt are intended to prohibit those activities specified by Congress in the statute without unduly interfering with legitimate negotiating practices between multichannel video programming distributors and programming vendors.'"[14] And, to the extent that the courts have been involved in reviewing the Commission's exercise of its authority under Section 616, they have only reinforced the understanding that Congress was solely concerned with the anticompetitive risks embodied in those enumerated provisions.[15]

Indeed, had Congress meant for the first sentence of Section 616(a) to be the open-ended grant of authority that the NPRM now proposes to exercise, that grant would be an unconstitutional delegation of legislative authority. Article I, Section 1 of the Constitution vests all legislative powers in Congress, and the Supreme Court has made clear that the authority to exercise such powers may not be ceded to the Executive Branch or to administrative agencies. Congress may grant rulemaking and decision-making authority – but only if it also articulates "an *intelligible principle* to which the person or body authorized to [act] is directed to conform."[16]

The guiding principle may be specific, as, for instance, in Section 623(b) of Title VI, which provides that the Commission "shall, by regulation, ensure that the rates for the basic service tier are reasonable," and then sets forth detailed standards for determining reasonableness.[17] Or it may even be as broad as a directive to adopt particular rules that, in the

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[14] AT&T NOI Comments at 18, *quoting Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265, Second Report and Order, 9 FCC Rcd 2642, ¶ 1 (1993).

[15] *See, e.g.*, *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 145-147 (2d Cir. 2013).

[16] *Whitman v. American Trucking Associations*, 531 U.S. 457, 472 (2001), *quoting J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (emphasis added).

[17] 47 U.S.C. 543(b). For example, Section 623(b)(1) provides that "Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system

Commission's expert judgment, are in the "public interest."[18] But to constitute a permissible grant of rulemaking authority, a particular statutory provision must include *some* legislative standard to which the rules must conform – not simply a conferral of subject matter jurisdiction to regulate in some unspecified, standardless manner.

The first sentence of Section 616(a) contains no such standard. If it were not followed by a list of specific rules that were meant to comprise, in toto, the rules authorized by Section 616(a), it would be an unconstitutional delegation of legislative power. So, even if it were possible and reasonable to construe the language of Section 616(a) as a grant of general, standardless jurisdiction to regulate programming agreements as well as several mandatory regulations, the Commission would be bound to avoid the serious constitutional questions that would accompany such a construction and choose an alternative reasonable interpretation if one existed.[19]

There is, of course, a *more* reasonable construction. In fact, in light of the purposes of Section 616 and the longstanding construction of the provision by the Commission, the *sole* reasonable view is that the specific enumerated rules are the only regulations to be included in the regulatory mandate of the first sentence. In other words, Section 616 cannot reasonably be construed to authorize the rules proposed in the NPRM.[20]

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were subject to effective competition." Section 623(b)2) then sets forth seven factors that the Commission "shall take into account" in establishing those regulations.

[18] *See National Broadcasting Co. v. United States,* 319 U.S. 190, 225-226 (1943). *See also Mistretta v. United States*, 488 U.S. 361, 373-74 (1989).

[19] *See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

[20] While tentatively concluding that Section 616 provides authority for its proposed rules, the Commission also seeks input on whether Section 628 – the "program access" provisions of Title VI – might be a valid basis for those rules. NPRM, ¶ 40. The NPRM itself identifies the reasons why it would not. First of all, as the Commission notes, the provisions of Section 628 only apply to the conduct of cable operators (and common carriers to the extent they own cable programming networks) and not to other MVPDs such as DBS services. The proposed rules would apply to MFNs and ADMs entered into by any MVPD, and, as the Commission

Another reason why the constitutional avoidance doctrine precludes interpreting the statute to authorize the regulation of programming contracts suggested by the NPRM is that such regulation of the conduct and the choices of MVPDs and program networks would raise serious *First Amendment* problems. *Any* regulation of whether and how particular content is to be carried by an MVPD raises such questions and, to pass First Amendment muster, must at least be narrowly tailored to achieve an important identifiable governmental interest unrelated to the suppression of protected speech.[21] An open-ended grant of statutory authority to regulate programming contracts with no such identifiable interest or intelligible standard for regulating fails that test.

But exercising such authority in the manner and for the purposes proposed in the NPRM – *i.e.*, in order to promote the favorable carriage of particular independent and diverse program networks over other providers of video content – would be especially problematic:

> To be sure, beyond an interest in policing anticompetitive behavior, the FCC may think it preferable simply as a communications policy matter to equalize or enhance the voices of various entertainment and sports networks such as the Tennis Channel. But as the Supreme Court stated in one of the most important sentences in First Amendment history, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).[22]

suggests, applying them solely to cable operators would "lead to a disparity in regulatory treatment among MVPDs," *id.* – a disparity that would violate the First Amendment as an arbitrary regulation that discriminates impermissibly among similar speakers and further distort marketplace competition. Second, while the proposed rules are directly concerned with contractual provisions that affect the availability of programming to OVDs, Section 628 only applies to conduct that unfairly affects *MVPDs.* Therefore, because OVDs do not meet the statutory definition of an MVPD, Section 628 has no applicability to such provisions. *See* NCTA Comments in MB Docket 14-261 at 5-15 (March 3, 2015).

[21] *See, e.g.*, *Turner Broadcasting, Inc. v. FCC*, 512 U.S. 622, 662 (1994).

[22] *Comcast Cable Communications v. FCC*, *supra*, 717 F.3d at 994 (Kavanaugh, J., concurring).

There is, of course, no supportable interest in "policing anticompetitive behavior" that would support the regulations propose here, because, as we showed in our NOI comments and summarize again below, competition is already flourishing in the video marketplace in a manner that effectively constrains anticompetitive conduct.

II. COMPETITION AND DIVERSITY ARE THE HALLMARKS OF THE VIDEO PROGRAMMING MARKETPLACE.

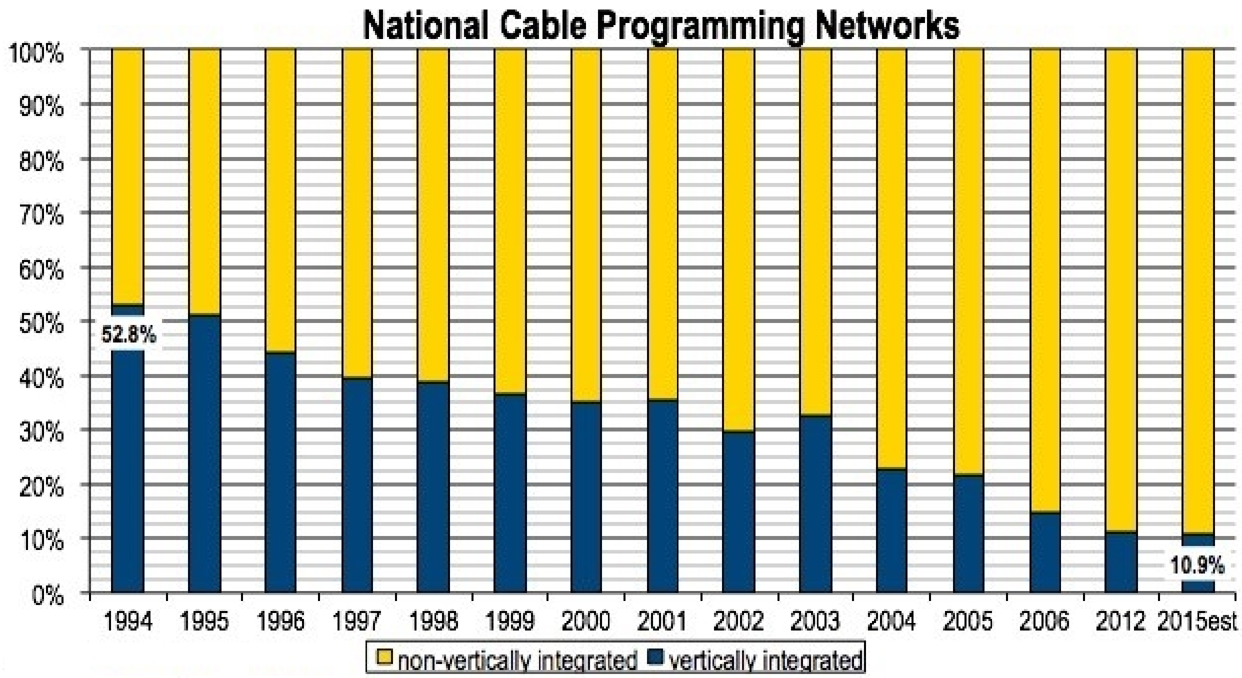
While the Commission's lack of jurisdiction ends the inquiry, its inability to regulate the terms and conditions of contracts between MVPDs and program networks does not, in any event, frustrate the goal of ensuring a robustly competitive video programming marketplace in which diverse independent programmers can make their content available to viewers. By any reasonable measure, that objective has been irreversibly fulfilled. As the Commission's own annual reports on this very subject have documented, and as we demonstrate below, competition has fully taken hold in that marketplace, not only among MVPDs and among programming networks competing for distribution by MVPDs but also among online video distributors (OVDs) and content providers.

Today's MVPDs – including incumbent cable operators, direct broadcast satellite (DBS) companies, and telephone companies and other "overbuilders" – barely resemble the cable systems of the late 20th century, which offered a few dozen channels of video programming, many of which were owned by cable companies. As the Commission has found, "[t]he major MVPDs now offer *hundreds* of television channels as well as *thousands* of video programs through VOD [video on demand] services."[23] Today, even the Commission has conceded that

[23] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253 ¶ 18 (2015) ("Sixteenth Video Competition Report").

there are more such programming networks than it can count.[24] And only a relative handful of those channels and programs are vertically integrated with cable companies.

Vertical integration between programming networks and cable operators remains at an historic low, with little change in the number of networks owned by the largest cable operators in recent years. As the Commission noted last year, only one of the top 20 most viewed cable networks was wholly owned by a cable operator.[25]



Source: NCTA Analysis of FCC, SNL Kagan Data

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[24] *See* NCTA Comments filed in MB Dkt. 14-16 at 10, note 13 (Mar. 21, 2014); *see also Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Report, 28 FCC Rcd 10496 (2013) ¶ 38 ("Fifteenth Report"); *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Report, 27 FCC Rcd 8610 (2012) ¶ 42 ("Fourteenth Report").

[25] *Annual Assessment for the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253 (2015) ¶ 34 ("Sixteenth Report"); *see also* Sixteenth Report, Appendix B, Table B-1; David Lieberman, Lisa de Moraes, *Cable TV Networks Wrap 2014*, Deadline, Dec. 31, 2014, *available at* http://deadline.com/2014/12/cable-television-2014-review-usa-network-espn-1201338597/.

In a vibrantly competitive video programming marketplace, not every content provider will succeed in gaining sufficient viewership to make its business model successful or even economically viable. But in such a marketplace, the carriage agreements that result do not generally *deprive* consumers of the benefits of competition. To the contrary, they are most likely to *provide* such benefits.

As Judge Kavanaugh explained in his concurring opinion in *Comcast Cable Communications v. FCC*, (the "Tennis Channel" program carriage case),

> [v]ertical integration and vertical contracts become potentially problematic only when a firm has market power in the relevant market. That's because, absent market power, vertical integration and vertical contracts are *procompetitive*. Vertical integration and vertical contracts in a competitive market encourage product innovation, lower costs for businesses, and create efficiencies – and thus reduce prices and lead to better goods and services for consumers.[26]

And, as discussed above, and as the D.C. Circuit has made clear in *Comcast Corp. v. FCC* (the "horizontal ownership" case), firms generally do *not* appear to have potentially troublesome market power in the relevant video programming distribution markets:

> First, the record is replete with evidence of ever increasing competition among video providers: Satellite and fiber optic video providers have entered the market and grown in market share since the Congress passed the 1992 Act, and particularly in recent years. Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992. Second, over the same period there has been a dramatic increase both in the number of cable networks and in the programming available to subscribers.[27]

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[26] *Comcast Cable Communications v. FCC*, 717 F.3d 982, 990 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (emphasis in original).

[27] *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009). Similarly, as Judge Kavanaugh noted, in *Cablevision Systems Corp. v. FCC* (the case challenging the Commission's extension of the now-expired prohibition on exclusive contracts between cable operators and cable-owned program networks):

> This radically changed and highly competitive marketplace – *where no cable operator exercises market power in the downstream or upstream markets and no national video programming network is so powerful as to dominate the programming market* – completely eviscerates the justification we relied on in *Time Warner* for the ban on exclusive contracts.

Cablevision Systems Corp. v. FCC, 597 F.3d 1306, 1324 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (emphasis added). (Judge Kavanaugh dissented because the Court refrained from addressing the petitioners' First Amendment arguments, to which these market power issues were relevant.)

Thus, while carriage on an MVPD platform may be beneficial to an individual program network, the highly competitive video marketplace has minimized the risk that anticompetitive conduct will affect program carriage decisions.

If promoting competition is the bottom line, almost any regulatory action that interferes with legitimate marketplace conduct by MVPDs and program networks would be counterproductive. And furthermore, if aimed at boosting and protecting certain *competitors*, it would have the effect of distorting *competition*, and would impair the benefits of a competitive marketplace where market incentives drive operators to support diverse, independent programming as part of their pay TV offerings.

Program diversity has always been an important goal of the cable industry, which, especially in a competitive marketplace, seeks to attract customers by providing a wide selection of niche and minority-interest programming that will be of particular interest to narrower segments of the population. Program networks similarly have an interest in developing unique programming that appeals to underserved audiences, such as Latino viewers,[28] African-American audiences,[29] and other ethnic and religious groups,[30] as well as those with interests in music, arts, and other niche interests. As a result, cable operators will continue to seek out – and will be able to find – diverse independent programming that will attract and retain subscribers.

In sum, there is no need for regulatory intervention by the Commission to promote diversity in the video marketplace. Instead, the Commission should be vigilant to ensure that its regulatory agenda does not *impair* and *diminish* the availability of such programming.

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[28] *E.g.*, El Rey, Fuse, Fusion, Galavision, Baby First Americas, Discovery en Espanol, and NBC Universo.

[29] *E.g.*, Africa Channel, Aspire, BET, Centric, Revolt, and TV One.

[30] *E.g.*, TV Asia, TV5Monde, TV Japan, Rai Italia, EWTN, and INSP.

CONCLUSION

The Commission lacks statutory – and constitutional – authority to adopt its proposed rules. Its authority to regulate the terms and conditions of programming agreements between MVPDs and program networks does not extend beyond the specific restrictions enumerated in Section 616 and codified in the current rules. But even if Section 616 conferred the open-ended authority that the Commission seeks to assert, regulatory intervention would be ill-advised, and contrary to the Commission's objectives of promoting competition and diversity. The vibrantly competitive video marketplace that exists today is already effectively doing that job itself. Intervention in order to promote certain program providers over others, besides raising serious jurisdictional and constitutional problems, would only distort and interfere with the procompetitive results of this marketplace.

Respectfully submitted,

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